

January 30, 2008

Ms. Anna Strimel
536 Main Street
Dover, DE 19904

**RE: Freedom of Information Act Complaint
Against Town of Cheswold**

Dear Ms. Strimel:

On August 17, 2007, our Office received your complaint alleging that the Town of Cheswold ("the Town") violated the open meeting requirements of the Freedom of Information Act, 29 *Del. C.* Chapter 100 ("FOIA"), by meeting in executive session on April 9, 2007 to discuss the impact fees for a development.¹

By letter dated August 20, 2007, our Office asked the Town to respond in writing to your complaint by August 31, 2007. Our Office received the Town's response on August 31, 2007. On September 4, 2007, our Office asked the Town for a copy of the minutes of the executive session held on April 9, 2007 for our *in camera* review. Our Office received those minutes on September 7, 2007.

The Town provided us with a copy of the agenda and minutes for the Town Council's April 9, 2007 meeting. The agenda listed for discussion, "Report on the review status of the Kowinsky Farm, LLC 'Annexation Agreement.'" The minutes of the public portion of the

¹ You made a nearly identical FOIA complaint in June of 2007 but alleged that the executive session took place at a meeting on May 7, 2007. By letter dated August 9, 2007, our Office determined that the Town met in executive session on May 7, 2007 "to discuss pending litigation, a matter authorized by FOIA for private discussion." In your most recent FOIA complaint, you responded: "I inadvertently stated the meeting occurred on May 7, 2007 when in fact it occurred on April 9, 2007."

April 9, 2007 meeting reflect that the Council voted to go into executive session “to discuss negotiations of the Kowinsky annexation.” The Council remained in executive session from 9:04 to 9:35 p.m. when it returned to public session. The minutes of the public portion of the meeting reflect that the Council then voted “to set the impact fee at \$800 with 25% to be paid within one year of the special election and the balance with permitting.”

According to the Town, the executive session on April 9, 2007 was “a brief strategy session . . . concerning impact fees. However, no decision was made during the executive session and the motion and vote took place in public.”

The minutes of the April 9, 2007 executive session reflect that it “was called to finalize the method of payment of the impact fees for the Saratoga Development. The Town Solicitor and representatives of the developer were invited to the session. There was discussion on the payment schedule of the impact fee which had been set previously at \$800 per unit.”

The Town provided our Office with a written statement from the Mayor, Donald Tinari. According to Mayor Tinari:

In an early version of the Annexation Agreement, the Town had asked that the impact fee be paid as follows: one quarter of the total fee to be paid upfront and the balance, based on the number of homes to be built, be paid off one quarter each following year until the whole amount was paid. By the time we met with DB&F and the developer on April 9, 2007, the housing market had fallen apart. The developer obviously had some serious concerns and requested that the Council consider a plan that allowed them to pay one quarter of the total impact fee by the time of final plan review, no longer than a year, and the balance of the impact fee by paid as each future home building permit was issued. This was the issue discussed at the Executive Session. No vote of any kind was taken at the Executive Session...

According to the Town, the impact fees for Kowinsky Farms was formally voted on and approved at an earlier March 29, 2007 special meeting, which was properly posted and recorded. Mayor Tinari explained that the Town Council did not discuss the amount of impact fees during executive session on April 9, 2007 “but what was really accepted was the duration of payment. This doesn’t seem to be of such significance as to setback [*sic*] many months of work, and there is nothing that indicates any action that had a negative impact on the Town or any resident or the contractor.”

RELEVANT STATUTES

FOIA requires that “[e]very meeting of all public bodies shall be open to the public except those closed” for executive session as authorized by statute. 29 *Del. C.* §10004(a).

FOIA authorizes a public body to meet in executive session for “strategy sessions, including those involving legal advice or opinion from an attorney-at-law, with respect to collective bargaining or pending or potential litigation, but only when an open meeting would have an adverse effect on the bargaining or litigation position of the public body.” *Id.* §10004(b)(4).

FOIA also authorizes a public body to meet in executive session for “[p]reliminary discussions on site acquisitions for any public funded capital improvements.” 29 *Del. C.* §10004(b)(2).

FOIA requires all public bodies to “give public notice of their regular meetings and their intent to hold an executive session closed to the public, at least 7 days in advance thereof. The notice shall include the agenda” *Id.* §10004(e)(2).

FOIA defines an “agenda” as a “general statement of the major issues expected to be discussed at a public meeting, as well as a statement of intent to hold an executive session and the specific ground or grounds therefor under subsection (b) of §10004 of this title.” *Id.* §10002(a).

FOIA requires a public body to “maintain minutes of all meetings, including executive sessions, . . . Such minutes shall include a record of those members present . . .” *Id.* §10004(f).

LEGAL AUTHORITY

A. Notice and Agenda for the April 9, 2007 Meeting

FOIA requires an agenda to disclose both the “intent to hold” an executive session and “the specific ground or grounds” for the executive session. *Chemical Industry Council of Delaware, Inc. v. State Coastal Zone Industrial Control Board*, C.A. No. 1216-K, 1994 WL 274295, at p.9 (Del. Ch., May 19, 1994) (Jacobs, V.C.). In *Chemical Industry Council*, the Chancery Court held that the Board violated the public notice requirements of FOIA because the agendas for two meetings did not adequately notify the public of the Boards intent to hold an executive session to discuss proposed regulations. “[T]he Board left the public in the dark as to what the closed sessions were all about.” *Id.* at p.10.

The agenda for the Town Council’s April 9, 2007 meeting did not inform the public that the Town might go into executive session and the purpose of the executive session (to discuss the schedule of payment of impact fees). The agenda did not even mention the term “executive session” much less did it give the public any idea about the purpose of the executive session.

Our Office determines that the Town violated the open meeting requirements of FOIA by not giving the public advance notice that it would meet in executive session on April 9, 2007 to discuss the impact fees associated with the Kowinsky Farm development.

B. Purpose of the April 9, 2007 Executive Session

The Town contends that FOIA authorized the Council to meet privately on April 9, 2007 as a “strategy session” to discuss the term of payment of the impact fees associated with the Kowinsky Farm development.

FOIA authorizes a public body to meet in private for a strategy session in two limited contexts: pending/potential litigation, and collective bargaining “but only when an open meeting would have an adverse impact on the bargaining or litigation position of the public body.” 29 *Del. C. §10004(b)(4)*. The Town contends that the executive session on April 9, 2007 was a “brief strategy session of the Council concerning the impact fees.” Just calling the executive session a “strategy session,” however, does not satisfy FOIA’s strict requirements for executive session. “FOIA contemplates that a closed session must be the exception, not the rule, for how a public body conducts its public business. Therefore, the statute requires the public body to justify its invocation of that exceptional procedure.” *Chemical Industry Council*, 1994 WL 274295, at p.10.

Based on the minutes of the April 9, 2007 executive session and the written statement of Mayor Tinari, our Office determines that the record does not justify the Town’s going into executive session to discuss the schedule of payment of impact fees associated with the

Kowinsky Farm development because the discussion did not involve litigation or collective bargaining strategy.

FOIA also authorizes a public body to meet in executive session to discuss “site acquisitions.” 29 *Del. C.* §10004(b)(2). This exception is designed “to protect the government when it enters the marketplace to purchase real property as an ordinary commercial buyer or seller.” *Att’y Gen. Op.* 02-IB27 (Nov. 4, 2002) (the minutes of executive session “confirm that the Council discussed the potential purchase of properties by the county, which is an authorized subject for discussion in executive session under FOIA”).

The minutes of the April 9, 2007 executive session show that the Town did not discuss the potential purchase of real estate. The Town discussed the payment schedule of impact fees with the developer. The presence of representatives of the developer belies any suggestion that the Council needed to meet privately to discuss the impact fees so as not to compromise its competitive position. The Town had discussed the amount of impact fees in public at the Council’s special meeting on March 29, 2007, and there was no justification under FOIA to meet in executive session with the developer on April 9, 2007 to discuss the schedule of payment.²

Our Office determines that the Town Council violated FOIA when it met in executive session on April 9, 2007 for a purpose not authorized by law. Our Office also determines that the Town violated FOIA by not preparing adequate minutes of that meeting. FOIA requires the

² Under FOIA, a public body cannot invite non-members as observers, or to participate in the discussion of matters not authorized for executive session. In such a role, the interests of the non-members in attendance are indistinguishable from those of any other members of the public. Their admission to the exclusion of others transforms the so-called executive session into a meeting that must be open to all of the public. *Att’y Gen. Op.* 02-IB17 (Aug. 6, 2002).

Ms. Anna Strimel
January 30, 2008
Page7

minutes to “include a record of those members present.” 29 *Del. C.* §10004(f). The minutes of the April 9, 2007 executive session did not include the names of the Council members present or the representatives of the developer.

CONCLUSION

For the foregoing reasons, our Office determines that the Town violated the public notice requirements of FOIA by failing to disclose to the public in the agenda for the April 9, 2007 meeting that the Council would go into executive session to discuss the impact fees associated with the Kowinsky Farm development. Our Office also determines that the Town violated FOIA by meeting in executive session on April 9, 2007 for a purpose not authorized by law. The discussion of impact fees did not fall within FOIA's permitted use of executive session to discuss site acquisitions, or pending/potential litigation or collective bargaining. Our Office also determines that the Town violated FOIA by not preparing adequate minutes of the April 9, 2007 executive session, which did not include a record of the persons in attendance.

The Town can remediate these FOIA violations by re-noticing the issue of the payment schedule of impact fees associated with the Kowinsky Farm development to the public in strict compliance with the notice requirements of FOIA for new and substantial reconsideration of that matter of public business within thirty days of the date of this letter. Our Office asks the Town Solicitor to report back to us in writing within five business days after the Town has remediated.

Very truly yours,

Judy Oken Hodas, Esquire
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire

State Solicitor

Ms. Anna Strimel
January 30, 2008
Page 9

cc: The Honorable Joseph R. Biden, III
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